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# Intentional Infliction of Emotional Distress among Family Members

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# INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AMONG FAMILY MEMBERS

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The family is one of the cornerstones of society.[1] Family relationships are a source of great support and satisfaction for family members,[2] but these ties can be a two-edged sword. Because family members are so interdependent, they are especially able to cause one another unhappiness and mental distress.[3]

This article will analyze intrafamily tort litigation, and particularly litigation involving emotional distress brought upon one family member by another. It discusses the development and historical limits placed on the emotional distress tort, how the cause of action has been analyzed when presented, and suggests an analysis that may overcome some difficulties in its application in the family setting.

## I. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The intentional infliction of emotional distress tort developed rather late in the course of the common law. Traditionally, mental distress was recognized as an element of damage when suffered as an incident to an already established tort[4] or as a consequence of a direct physical injury.[5]

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1. Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage is a fundamental right); N. ACKERMAN, THE PSYCHODYNAMICS OF FAMILY LIFE 15 (1958); N. BELL and E. VOGEL, A MODERN INTRODUCTION TO THE FAMILY 9-20 (rev. ed. 1968); G. SIMPSON, PEOPLE IN FAMILIES 31 (1960).

2. N. ACKERMAN, *supra* note 1, at 16: "Psychologically, the members of the family are bound by mutual interdependence for the satisfaction of their respective affectional needs."; Benedek, *The Emotional Structure of the Family*, in THE FAMILY: ITS FUNCTION AND DESTINY 358-64, 378-80 (R. Anshen ed., rev. ed. 1959).

3. N. ACKERMAN, *supra* note 1, at 18, 22-23.

4. *See* Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937) (battery); American Sec. Co. v. Cook, 49 Ga. App. 723, 176 S.E. 798 (1934) (trespass to land); Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933) (assault); Watson v. Dilts, 116 Iowa 249, 89 N.W. 1068 (1902) (trespass to land); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927) (invasion of right to privacy); DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881) (deceit); Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935) (trespass to land); Shellabarger v. Morris, 115 Mo. App. 566, 91 S.W. 1005 (1905) (nuisance); Kuregeweit v. Kirby, 88 Neb. 72, 129 N.W. 177 (1910) (assault); Salisbury v. Poulson, 51 Utah 552, 172 P. 315 (1918) (false imprisonment).

5. Several early courts denied recovery unless the emotional distress was accompanied by a direct physical injury. *See* St. Louis I.M. & S. Ry. v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901); Herrick v. Evening Express Publishing Co., 120 Me. 138, 113 A.16 (1921), *overruled*, 269 A.2d 117 (1970); Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899), *overruled*, 179 N.W.2d 390 (1970); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896), *overruled*, 176 N.E.2d 729 (1961); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958), *overruled*, 261 A.2d 84 (1970). *See also* Annot., 64 A.L.R.2d 100, 134 (1959).

Many courts following this rule, however, allowed large recoveries for "mental anguish"

Mental distress alone, however, was not considered compensable in tort,[6] since such damage was argued to be too difficult to assess[7] and too easily feigned.[8] Courts worried that they would be flooded with litigation,[9] and argued that mental distress was not foreseeable damage for which a defendant should be responsible.[10]

Despite such concerns, criticism grew[11] and in 1948 the Restatement (Second) of Torts section 46 recognized an independent cause of action for outrageous conduct causing severe emotional distress.[12] Under this action a defendant is subjected to liability by plaintiff's proof of four elements: defendant's extreme and outrageous conduct,[13] intended[14] to cause[15] plaintiff

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when accompanied by only a slight physical injury. W. PROSSER, LAW OF TORTS § 12, at 50 (4th ed. 1971). *See* Ragsdale v. Ezell, 99 Ky. 236, 49 S.W. 775 (1899) ($700 for a hug and a kiss "against her wish and by force"); Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884) ($1200 for spitting in the face); Craker v. Chicago & North Western R.R. Co., 36 Wis. 657 (1875) (school teacher who was kissed awarded $1,000 for her "terror and anxiety" as well as her "outraged feeling and insulted virtue").

6. *See* Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Gefter v. Rosenthal, 384 Pa. 123, 119 A.2d 250 (1956); Harned v. E-Z Finance Co., 151 Tex. 641, 254 S.W.2d 81 (1953); Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900). *See also* Annot., 64 A.L.R.2d 100, 143 (1959).

7. Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896), *overruled*, 176 N.E.2d at 730 (1961) ("If the right of recovery in this class of cases should be once established it would naturally result . . . in cases . . . where the damages must rest upon mere conjecture or speculation".) *See also* Chicago, B&Q R.R. v. Gelvin, 238 F.14 (8th Cir. 1916); Cleveland C.C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900).

8. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354, (1896), *overruled*, Battalla v. New York, 176 N.E.2d 729 (1961); Johnson v. Great Northern Ry., 107 Minn. 285, 119 N.W. 1061 (1909).

9. Spade v. Lynn & B.R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896), *overruled*, Battalla v. New York, 176 N.E.2d 729 (1961); Huston v. Freemansburg, 212 Pa. 48, 61 A.1022 (1905), *overruled*, 261 A.2d 84 (1970); Oehler v. L. Bamberger & Co., 4 N.J. Misc. 1003, 135 A. 71, *aff'd*, 103 N.J.L. 703, 137 A. 425 (1926).

10. Oehler v. L. Bamberger & Co., 4 N.J. Misc. 1003, 135 A. 71, *aff'd*, 103 N.J.L. 703, 137 A. 425 (1926); Justesen v. Pennsylvania R.R., 92 N.J.L. 257, 106 A.137 (1919); Miller v. Baltimore & O.S.W. R.R., 78 Ohio St. 309, 85 N.E. 499 (1908) *overruled*, 447 N.E.2d 109 (1983).

11. *See* Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952). *See also* Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956).

12. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

*Id.*

The tort will be referred to in this article as the intentional infliction of emotional distress or the tort of outrage.

13. RESTATEMENT (SECOND) OF TORTS § 46, comment d (1965).

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community

severe emotional distress.[16] Today, the intentional infliction of emotional distress tort is well established and recognized as an independent tort in most United States jurisdictions.[17]

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would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

*Id.*

14. In tort law, the intent element requires no ill-will or motive on the part of the defendant to harm the plaintiff. Liability extends to both actually desired consequences and those which the defendant, based on an objective standard, knew or should have known were substantially certain to result from his conduct. W. PROSSER, *supra* note 5, § 8, at 31-32. Note that section 46 also applies in situations where the defendant has acted recklessly, defined in section 500 as being "in deliberate disregard of a high degree of probability that the emotional distress will follow." RESTATEMENT (SECOND) OF TORTS § 46, comment i (1965).

15. The causal concept has two aspects in tort law—cause in fact and proximate cause. Defendant's action is a factual cause of an injury if it is a substantial factor in bringing it about. RESTATEMENT (SECOND) OF TORTS § 431 (1965). Proximate cause on the other hand connotes policy limitations on liability. But, according to the court in DeRosier v. New England Tel. & Tel. Co., 81 N.H. 451, 464, 130 A.145, 152 (1925): "For an intended injury the law is astute to discover even very remote causation."

16. RESTATEMENT (SECOND) OF TORTS § 46, comment j (1965).

Severe Emotional Distress

Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity . . . .

The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a particular susceptibility to such distress of which the actor has knowledge. See Comment f.

17. A partial listing of these jurisdictions may be found in Note, *Torts: An Analysis of Mental Distress as an Element of Damages and as a Basis of an Independent Cause of Action When Intentionally Caused*, 20 WASHBURN L.J. 106, 107-08 (1980). The following jurisdictions have adopted the intentional infliction of emotional distress as an independent tort as of this writing:

Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939); American Road Service Co. v. Inmon, 394 So. 2d 361 (Ala. 1980) (dicta); Savage v. Boles, 77 Ariz. 355, 272 P.2d 349 (1954); M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980); Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 439, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970); Hiers v. Cohen, 31 Conn. Supp. 305, 329 A.2d 609 (Conn. Super. Ct. 1973); Ford Motor Credit Co. v. Sheehan, 373 So. 2d 956 (Fla. Dist. Ct. App. 1979); Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S.E. 189 (1907); Hatfield v. Max Rouse & Sons N.W., 100 Idaho 840, 606 P.2d 944 (1980); Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); Aetna Life Ins. Co. v. Burton, 104 Ind. App. 576, 12 N.E.2d 360 (1938); Curnett v. Wolf, 244 Iowa 683, 57 N.W.2d 915 (1953); Dawson v. Associates Fin. Servs. Co., 215 Kan. 814, 529 P.2d 104 (1974); Browning v. Browning, 584 S.W.2d 406 (Ky. Ct. App. 1979); Quina v. Roberts, 16 So. 2d 558 (La. Ct. App. 1944); Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979); Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977) (dicta); Agis v. Howard Johnson, Co., 371 Mass. 140, 355 N.E.2d 315 (1976); Warren v. June's Mobil Home Village & Sales, Inc., 66 Mich. App. 386, 239 N.W.2d 380 (1976); Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938); Labrier v. Anheuser Ford, Inc., 612 S.W.2d 790 (Mo. App. 1981); LaSalle Extension Univ. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934); Burrus v. Nevada, Cal., Or. R.R., 38 Nev. 156, 145 P. 926 (1915), *error dismissed*, 244 U.S. 103 (1917); Hume v. Bayer, 178 N.J. Super. 310, 428 A.2d 966 (1981) (dicta); Fischer v. Maloney, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978) (dicta); Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981); Mashunkashey v. Mashunkashey, 189 Okla. 60, 113 P.2d 190 (1941); Rockhill v. Pollard, 259 Or. 54, 485 P.2d 28 (1971); Forster v. Manchester, 410 Pa. 192, 189 A.2d 147 (1963); Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981); First Nat'l Bank v. Bragdon, 84 S.D. 89, 167 N.W.2d 381 (1969); Medlin v. Allied Inv. Co., 217 Tenn. 469, 398 S.W.2d 270 (1966) (dicta); Stafford v. Steward, 295

Intentional infliction of emotional distress has been plead in a wide variety of situations.[18] As illustration, creditors have been subjected to liability for particularly oppressive collection practices,[19] landlords have been held liable for harrassing unwanted tenants,[20] and an ambulance service operator who refused to dispatch an ambulance for plaintiff's critically ill wife for a petty reason, was found liable by a jury on the tort of outrage.[21]

## II. HISTORICAL LIMITATIONS ON EMOTIONAL DISTRESS CAUSE OF ACTION

### A. *Intrafamilial Immunities*

The intentional infliction of emotional distress tort has appeared infrequently in intrafamily litigation and when it has, it often has been given a chilly reception.[22] One factor undoubtedly influencing this dearth of intrafamily emotional distress suits has been the prevalence of intrafamily immunities.

At common law, this immunity precluded suit by either spouse because the woman was viewed as having lost her separate indentity at marriage and could not sue without joining her husband.[23] Thus, the husband would be

S.W.2d 665 (Tex. Civ. App. 1956); Jeppsen v. Jensen, 47 Utah 536, 155 P. 429 (1916); Sheltra v. Smith, 136 Vt. 472, 392 A.2d 431 (1978); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974); Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977); Harless v. First Nat'l Bank, 289 S.E.2d 692 (W.Va. 1982); Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

18. *See, e.g.*, Holmes v. Oxford Chemicals Inc., 510 F. Supp. 915 (M.D. Ala. 1981), *aff'd*, 672 F.2d 854 (11th Cir. 1982) (employer reduced worker's disability payments from $500 to $49.10 per month); Jones v. Musician's Union Local No. 6, 446 F. Supp. 391 (N.D. Cal. 1977) (musician denied tenure with symphony orchestra by union vote); Peddycoart v. City of Birmingham, 392 So. 2d 536 (Ala. 1980) (parents told incorrectly that their son had committed suicide while in jail); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (threats to beat plaintiff, destroy his trucks and ruin his business unless he turned over the proceeds from the territory of an association member); Great A. & P. Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1930) (defendant wrapped up a dead rat instead of a loaf of bread for a sensitive plaintiff); Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981) (plaintiff handcuffed, beaten, threatened with bodily harm and told to leave the state or be killed); Goldfarb v. Baker, 547 S.W.2d 567 (Tenn. 1977) (university professor wrongfully accused plaintiff of striking him with a pie in the face and of attempted blackmail); Scarpaci v. Milwaukee County, 96 Wis. 2d 663, 292 N.W.2d 816 (1980) (parents bring action for wrongful performance of an autopsy on their deceased son).

19. *See, e.g.*, Digsby v. Carroll Baking Co., 76 Ga. App. 656, 47 S.E.2d 203 (1948) (defendant's agent suggested to plaintiff that he would "take it out in trade" if she was unable to pay her bill); Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932) (widow threatened with suit unless she paid her bills); Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936) (pregnant woman called "deadbeat" by collection agent and threatened with arrest); Turman v. Central Billing Bureau, Inc., 270 Or. 443, 568 P.2d 1382 (1977) (blind woman called "scum" and "deadbeat" by collection agency hired by her eye clinic); Duty v. General Finance Co., 154 Tex. 16, 273 S.W.2d 64 (1954) (daily telephone calls, telegrams and letters, threats of job loss, telling neighbors plaintiffs were "deadbeats", harassing plaintiffs at work, calling their relatives, etc.).

20. *See* Kaufman v. Abramson, 363 F.2d 865 (4th Cir. 1966); Newby v. Alto Riviera Apartments, 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976); Duncan v. Donnell, 12 S.W.2d 811 (Tex. Civ. App. 1928); Nordgren v. Lawrence, 74 Wash. 305, 133 P. 436 (1913).

21. DeCicco v. Trinidad Area Health Ass'n, 40 Colo. App. 63, 573 P.2d 559 (1977).

22. *See infra* note 58 and accompanying text.

23. *See* Rogers v. Smith, 17 Ind. 323 (1861); Laughlin v. Eaton, 54 Me. 156 (1866); Dengate v. Gardner, 4 M. & W. 5, 150 Eng. Rep. 1320 (1838).

on both sides of any lawsuit by his wife against him.

This immunity was somewhat restricted when, beginning around 1844, the Married Women's Acts were passed in every jurisdiction, giving a married woman a separate legal identity.[24] These statutes usually were construed to allow a suit against the woman's husband for torts against her property,[25] but not for torts against her personal interests.[26] This interspousal immunity was justified by a number of rationales: preservation of domestic tranquility,[27] prevention of a flood of litigation,[28] availability of other remedies such as divorce and criminal actions,[29] protection of insurers from collusive suits,[30] and fear that the tortfeasor would share in the insurer's payment.[31]

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24. For a compilation of these laws see 3 C. VERNIER, AMERICAN FAMILY LAW §§ 167, 179, 180 (1935).

25. *See* Adams v. Adams, 51 Conn. 135 (1883) (fraud); Hubbard v. Ruff, 97 Ga. App. 251, 103 S.E.2d 134 (1958) (negligent damage to property); Crater v. Crater, 118 Ind. 521, 21 N.E. 290 (1888) (ejectment); Carpenter v. Carpenter, 154 Mich. 100, 117 N.W. 598 (1908) (conversion).

26. *See* Thompson v. Thompson, 218 U.S. 611 (1910) (assault and battery); Faris v. Hope, 298 F.727 (8th Cir. 1924) (defamation); Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945) (malicious prosecution); Campbell v. Campbell, 145 W. Va. 245, 114 S.E.2d 406 (1960) (negligent personal injury).

27. In Ritter v. Ritter, 31 Pa. 396 (1858) the court stated: "The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed — an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders." *Id.* at 398, *quoted in* Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423, 433 (1966). *See* Thompson v. Thompson, 218 U.S. 611 (1910); Corren v. Corren, 47 So. 2d 774 (Fla. 1950); David v. David, 161 Md. 532, 157 A. 755 (1932); Patenaude v Patenaude, 195 Minn. 523, 263 N.W. 546 (1935), *overruled*, 173 N.W.2d 416 (1969); Kennedy v. Camp. 14 N.J. 390, 102 A.2d 595 (1954); Longendyke v. Longendyke, 44 Barb. 367 (N.Y. 1863).

28. *See* Thompson v. Thompson, 218 U.S. 611, 617-18 (1910); Mims v. Mims, 305 So. 2d 787, 789 (Fla. Dist. Ct. App. 1974); Corren v. Corren, 47 So. 2d 774, 776 (Fla. 1950); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W.287, 288 (1898). *But see* Brown v. Brown, 381 Mass. 231, 409 N.E.2d 717, 718 (1980) (allowing wife recovery for husband's negligence in failing to shovel sidewalk after a snowstorm). *See generally* Moore, *The Case for Retention of Interspousal Tort Immunity*, 7 OHIO N.U.L. REV. 943, 948-50 (1980).

29. In Thompson v. Thompson, 218 U.S. 611 (1910), Justice Day, writing for the majority, stated:

> Nor is the wife left without remedy for such wrongs. She may resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offense committed. She may sue for divorce or separation and for alimony. The court in protecting her rights and awarding relief in such cases may consider, and, so far as possible, redress her wrongs and protect her rights.

*Id.* at 619. *See also* Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27 (1877) (wife could not sue husband civilly for assault because criminal court was available to an assaulted wife); Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920) (husband could not sue wife in tort because divorce was the appropriate remedy). *See generally* Comment, *supra* note 27, at 436-37 (divorce courts and criminal courts furnish ample redress to the husband and wife).

30. *See* Maine v. James Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20, 22 (1924); Newton v. Weber, 119 Misc. 240, 196 N.Y.S. 113, 114 (1922); Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533, 535 (1965); Varholla v. Varholla, 56 Ohio St. 2d 269, 383 N.E.2d 888, 889-90 (1978); Smith v. Smith, 205 Or. 286, 287 P.2d 572, 583 (1955); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389, 390-92 (1963). *But see* Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 72, 26 Cal. Rptr. 102 (1962) (finding the possibility of insurance fraud unconvincing as a justification for denying a spouse recovery).

31. *See* Burns v. Burns, 111 Ariz. 178, 526 P.2d 717, 719 (1974); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389, 391 (1963). *See generally* Moore, *supra* note 28, at 947 (since a husband or wife who has obtained a tort judgment against his spouse can continue to cohabitate

Dissatisfaction with these rationales has been well documented by legal commentators[32] and reflected by vigorous court action. In fact, twenty-nine jurisdictions have abolished the interspousal immunity rule entirely,[33] and five more apparently have abolished interspousal immunity where intentional torts are involved.[34] Because of the abolition of these immunities a woman now may sue her husband for infringements of property or personal interests.

Similarly, immunity developed between parent and child.[35] This immunity was justified by concerns of collusive suits[36] because the parent or child might inherit from the other's estate undermining parental authority,[37] upsetting the allocation of family resources,[38] and destroying family unity.[39] As with interspousal immunity, these justifications have been found insufficient,[40] and parent-child immunity has been abolished generally in at least seventeen jurisdictions.[41] Eight other states appear to except intentional torts from the immunity.[42]

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with the latter, it is unrealistic to assume that the tortfeasor will not share in the benefits of an award paid by the defendant's insurance company).

32. *See, e.g.*, Farage, *Recovery for Torts Between Spouses*, 10 IND. L.J. 290, 302-03 (1934); Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 15 MOD. L. REV. 133, 154 (1952); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 306-07 (1959); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1033-35 (1930); Comment, *Tort Liability Within the Family Area*, 51 NW. U.L. REV. 610, 618-20 (1956); Comment, *supra* note 27, at 455-56; *But see* Moore, *supra* note 28, at 951-53 (the reasons for retaining interspousal immunity has substance while the arguments promoting abrogation of the doctrine are unconvincing). *See generally* RESTATEMENT (SECOND) OF TORTS § 895F (1979) (rejecting the immunity of one spouse from liability in tort to the other).

33. *See generally* RESTATEMENT (SECOND) OF TORTS § 895F, app. §§ 841-end, at 287-91 (1979) for a list of jurisdictions that have abrogated the interspousal immunity rule.

34. *See* Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157-58 (1971) (after divorce); LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 201 N.E.2d 533 (1963); Apitz v. Dames, 205 Or. 242, 287 P.2d 585 (1955); Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977), *appeal after new trial*, 611 S.W.2d 685 (Tex. 1980); Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954) (divorce pending).

35. *See* Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P.788 (1905).

36. *See, e.g.*, Dennis v. Walker, 284 F. Supp. 413 (D.D.C. 1968); Thomas v. Inmon, 268 Ark. 221, 594 S.W.2d 853 (1980); Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957); Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954).

37. *See, e.g.*, Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

38. *See, e.g.*, Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

39. *See, e.g.*, Thomas v. Inmon, 268 Ark. 221, 594 S.W.2d 853 (1980); Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); Ball v. Ball, 73 Wyo, 29, 269 P.2d 302 (1954).

40. *See, e.g.*, Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1970); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1922); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971). *See also* RESTATEMENT (SECOND) OF TORTS § 895G (1979) (rejecting the immunity from liability in tort between parent and child).

41. See generally RESTATEMENT (SECOND) OF TORTS § 895G, app. §§ 841-end, at 292-94 (1979) for a list of jurisdictions that have abrogated the parent-child immunity rule.

42. *See* RESTATEMENT (SECOND) OF TORTS § 895G comment e (1979); Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Small v. Rockfeld, 66 N.J. 231, 330

These historical immunities between spouses, and parent and child, have crumbled slowly. The majority of jurisdictions currently allow suits between family members where the basis of the action is an intentional tort.[43] Yet, even where immunities are abrogated, the parameters of the duty between the parties still need definition. Although most courts today condemn intrafamily physical abuse without hesitation, many show little concern over intentional emotional harm.

### B. *Abolishing Familial Causes of Action*

Recently, courts and legislatures have dealt cautiously with emotional injury in the family setting by abolishing the causes of action for criminal conversation and alienation of affections.[44] Traditionally, the criminal conversation action has protected a plaintiff's interest in exclusive sexual intercourse with his or her spouse[45] and the alienation of affections tort has protected plaintiff's interest in his or her spouse's affection and emotional involvement.[46] The criminal conversation tort is directed at adultery while an alienation of affections action more broadly protects the marriage from intentional interference. Damages awarded in these actions often have included compensation for injury to plaintiff's feelings and reputation.[47] Society's interest in strengthening marital bonds serve as justification for these actions.[48]

Over time, whether that policy was furthered by the cause of action was questioned.[49] Concerns developed that it was difficult for juries to analyze

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A.2d 335 (1974); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950); Hoffman v. Tracy, 67 Wash. 2d 31, 406 P.2d 323 (1965); Oldman v. Bartshe, 480 P.2d 99 (Wyo. 1971); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966).

43. Obviously, no suit for the intentional infliction of emotional distress will be allowed in those jurisdictions currently retaining intrafamily immunities. One would expect this strong trend toward abolition of the immunities to continue, and the "duty" issue addressed subsequently in this article will be pertinent in those jurisdictions currently retaining the immunities as well.

44. Admittedly, eventually the typical defendant in an alienation of affections or criminal conversation action is the third party with whom the spouse is involved. Yet, with the abrogation of immunities, logically the participating spouse could be liable for plaintiff's loss as well. *See* Kavanaugh, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 337-38 (1981) (analogizing to interference with contract suit against original contracting party); Note, *Minor Child Has No Cause of Action Against Parent for Emotional Harm Caused by Abandonment*, 58 WASH. U.L.Q. 189, 190-91 (1980) (suggesting analogy with alienation of affections action when child sues parent for abandonment). *But see* Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105, 1112 (1978) (alienation of affections action available only against third party).

45. *See* Bearbower v. Merry, 266 N.W.2d 128, 129-30 (Iowa 1978) (the tort of criminal conversation has been abrogated in Iowa as to conduct occurring after January 1, 1978); Kremer v. Black, 201 Neb. 467, 469, 268 N.W.2d 582, 584 (1978); Sebastian v. Kluttz, 6 N.C. App. 201, 209, 170 S.E.2d 104, 108 (1969). *See generally* W. PROSSER, *supra* note 5, § 124, at 875.

46. *See* Harlow v. Harlow, 152 Va. 910, 939-40, 143 S.E. 720, 728 (1928).

47. Karchner v. Mumie, 398 Pa. 13, 156 A.2d 537, 539 (1959); Vaughn v. Blackburn, 431 S.W.2d 887, 889 (Ky. 1968); Sebastian v. Kluttz, 6 N.C. App. 201, 220, 170 S.E.2d 104, 111 (1969).

48. *See, e.g.*, Hobbs v. Holliman, 74 Ga. App. 735, 41 S.E.2d 332 1947); Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978).

49. *See, e.g.*, Fundermann v. Mickelson, 304 N.W.2d 790 (Iowa 1981); Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927); Thompson v. Chapman, 93 N.M. 356, 600 P.2d 302

rationally the emotional situations,[50] that the cause of action failed to protect the family,[51] that it fostered blackmail,[52] and that it appeared the plaintiff was selling the spouse's affections to a third-party buyer.[53] As a result, thirty states and the District of Columbia have either abrogated or restricted the alienation of affections action[54] and twenty-two states and the District of Columbia have abolished the criminal conversation tort.[55]

This trend obviously indicates little concern with emotional injury to family relational interests. Certain rationales underlying the trend, such as concern with jury prejudice and the negative effect on the family, do counsel against an emotional distress action. But more arguably, the trend toward abrogation of these actions when they are directed at third parties indicates a concern with blackmail, an obvious abuse of the actions.[56] Even if these concerns justify abolition of third-party alienation of affections actions, they do not justify a blanket denial of intentional infliction of emotional distress actions.[57]

## III. EMOTIONAL DISTRESS ACTION IN FAMILY SETTINGS

Very few actions for emotional distress within the family have succeeded.[58] Reported cases run the gamut from complaints about a defendant

(1979); Felsenthal v. McMillan, 493 S.W.2d 729 (Tex. 1973) (Steakley, J., dissenting); Wyman v. Wallace, 94 Wash. 2d 99, 615 P.2d 452 (1980).

50. Wyman v. Wallace, 94 Wash. 2d 99, 105, 615 P.2d 452, 455 (1980).

51. *See* Fundermann v. Mickelson, 304 N.W.2d 790, 791 (Iowa 1981); Wyman v. Wallace, 94 Wash. 2d 99, 105, 615 P.2d 452, 455 (1980).

52. *See* Moulin v. Monteleone, 165 La. 169, 195, 115 So. 447, 457 (1927); Morgan v. Yarborough, 5 La. Ann. 316, 323 (1850) (breach of promise to marry); Fadgen v. Lenkner, 469 Pa. 272, 280, 365 A.2d 147, 151 (1976); Wyman v. Wallace, 94 Wash. 2d 99, 105, 615 P.2d 452, 455 (1980).

53. *See* Fundermann v. Mickelson, 304 N.W.2d 790, 792 (Iowa 1981); Wyman v. Wallace, 94 Wash. 2d 99, 105, 615 P.2d 452, 455 (1980).

54. For a list of jurisdictions that have abolished or limited the alienation of affections action, see Kavanaugh, *supra* note 45, at 330-31 n.62.

55. For a list of jurisdictions that have abolished or limited the criminal conversation action, see Kavanaugh, *supra* note 45, at 331 n.63.

56. *See* F. HARPER, PROBLEMS OF THE FAMILY 169 (1952); Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME LAW. 426, 430 (1972).

57. In Van Meter v. Van Meter, 328 N.W.2d 497 (Iowa 1983) the court refused to dismiss a claim for infliction of emotional distress and concluded:

> The elements of the tort of intentional infliction of emotional distress, and some of its policy considerations, are different from those in an alienation claim. We cannot conclude as a matter of law that no facts are conceivable under which a claim for intentional infliction of emotional distress could be maintained merely because it, like alienation claims, arises out of a failed marital relationship.

*Id.* at 498.

*See also* Comment, *Loss of Consortium and Intentional Infliction of Emotional Distress: Alternative Theories to Alienation of Affections*, 67 IOWA L. REV. 859, 873-74 (1982).

58. Cases discussed involve suits between parent and child, between husband and wife and between ex-spouses. The inclusion of the latter category indicates that the subject of this article is more correctly understood as emotional distress arising out of the family relationship. In fact, the type of relationship existing between the parties and whether or not the distress arises from that relationship is relevant to how the case should be analyzed. Unfortunately, judicial decisions have failed to make these distinctions, and this failure has added to the confusion in the area. *See infra* text accompanying notes 142-47.

telling his spouse he no longer loved her,[59] failure to pay alimony,[60] failure to abide by a visitation schedule,[61] to complaints about child snatching.[62] Unfortunately, a coherent analysis has not been applied in many of these cases, perhaps explaining the judicial reluctance to recognize that family members can, and do, inflict emotional distress upon one another.

Court decisions refusing to recognize the propriety of an intentional infliction of emotional distress action in the family are plentiful. Exemplifying this judicial reluctance is *Browning v. Browning*,[63] where plaintiff husband sued his wife and her companion for alienation of affections and intentional infliction of emotional distress because of defendants' extra-marital affair. Although the appellate court affirmed the trial court's dismissal of the emotional distress cause of action, it gave little reasoning for its decision, noting that in spite of recent trends recognizing the intentional infliction of emotional distress cause of action, public policy would not be served by recognizing a cause of action on these facts.[64] Instead of articulating these public policies, the court concluded only that "the morals of mankind are more perfectly judged by a court having a final and eternal jurisdiction."[65]

Similarly, the New York Court of Appeals in *Weicker v. Weicker* [66] concluded that to allow an action for the intentional infliction of emotional distress in the area of matrimonial difficulties would revive the evils of the alienation of affections and criminal conversation torts. The court affirmed the appellate court's reversal[67] of the trial court's conclusion[68] that plaintiff had a cause of action for her emotional distress suffered when her husband got an illegal Mexican divorce, remarried and held out another woman as his wife. Citing *Weicker's* reasoning, the court in *Wiener v. Wiener* [69] also concluded the counterclaimant wife had not stated a cause of action on allegations that her husband was abusive, told her he no longer loved her, and cut off her financial control.

In *McGrady v. Rosenbaum*,[70] the court held that a father's complaint that his ex-wife caused him mental distress by moving out of state with his child, in violation of a custody decree, was not appropriately resolved in an action for damages. Allegations in *Friedman v. Friedman* [71] that defendant failed to abide by the visitation provisions of the divorce decree met a similar fate.

59. Wiener v. Wiener, 84 A.D.2d 814, 444 N.Y.S.2d 130 (1981).
60. Deibel v. Deibel, 512 F. Supp. 135 (E.D. Mo. 1981).
61. Friedman v. Friedman, 79 Misc. 2d 646, 361 N.Y.S.2d 108 (1974).
62. Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978). *See infra* text accompanying notes 76-109.
63. 584 S.W.2d 406 (Ky. Ct. App. 1979).
64. *Id.* at 408.
65. *Id.*
66. 22 N.Y.2d 28, 237 N.E.2d 876, 290 N.Y.S.2d 732 (1968).
67. 28 A.D.2d 138, 283 N.Y.S.2d 385 (1967).
68. 53 Misc. 2d 570, 279 N.Y.S.2d 852 (1967).
69. 84 A.D.2d 814, 444 N.Y.S.2d 130 (1981). While the court seemed to consider the outrageousness of defendant's conduct, it is quite clear it was merely saying these claims are for the divorce court: "The bounds [of decency] in marital relationships are obviously circumscribed by the availability of another cause of action (i.e. a matrimonial action) and the abolition of causes for alienation of affections and criminal conversation." *Id.* at 815.
70. 62 Misc. 2d 182, 308 N.Y.S.2d 181 (1970), *aff'd mem.*, 324 N.Y.S.2d 876 (1971).
71. 70 Misc. 2d 646, 361 N.Y.S.2d 108 (1974).

Husbands and wives have not been the only intrafamily litigators. In *Burnette v. Wahl*,[72] several children sued their mothers for emotional injury suffered because of abandonment of the plaintiffs. Again the court decided that while the abandonment might be certain to cause mental distress, the tort was not applicable to the parent-child relationship. Accordingly, the court held that:

> If there is ever a field in which juries and general trial courts are ill equipped to do social engineering, it is in the realm of the emotional relationship between mother and child. It is best we leave such matters to other fields of endeavor. There are certain kinds of relationships which are not proper fodder for tort litigation, and we believe this to be one of them.[73]

The court expressed the concern that if such an action were recognized in this situation, then in any divorce action a parent would be liable to his or her child for emotional distress suffered because of the divorce.[74]

The lack of substantive analysis in these cases is apparent, since the emotional distress cause of action frequently is denied on vague policy grounds and by analogy to the often abolished cause of action for alienation of affections. Yet, as noted earlier,[75] the emotional distress action addresses different interests and is not subject to much of the criticism directed at the alienation of affections action.

Some courts have at least attempted to analyze the plaintiff's complaint or evidence in terms of the elements of the emotional distress tort, although such efforts often are muddled or conclusory. Even though these decisions have failed to clearly specify the standards of liability, they implicitly recognize the emotional distress cause of action in the family arena.

### A. Deprivation of Parental Rights

The emotional distress tort recently has been used successfully as a remedy for victims of child snatching in a significant number of jurisdictions. This tort has been used against child-snatching parents, and also against those who aid the abducting parent.[76] A tort-based suit potentially affords the victimized plaintiff the most complete compensation for his or her damages—costs incurred in attempting to recover the child and damages for mental distress. And a tort suit may be more effective in prompting the return of the child than other remedies.

In fact, the significance of the tort remedy grows when compared with other available remedies. Although most states have felony kidnapping statutes condemning parental kidnapping,[77] even if a felony conviction results in the return of the child, no costs or mental distress damages are recover-

72. 284 Or. 705, 588 P.2d 1105 (1978).
73. *Id.* at 1111, 284 Or. at 716.
74. *Id.*
75. *See supra* notes 56-57 and accompanying text.
76. *See infra* text accompanying notes 90-109.
77. For a list of state kidnapping statutes, see P. Hoff, J. Schulman, A. Volenik, & J. O'Daniel, Interstate Child Custody Disputes and Parental Kidnapping: Policy, Practice and Law, app. IV (1982).

able.[78] As additional deterrents to kidnapping, the Uniform Child Custody Jurisdiction Act (UCCJA)[79] and the Parental Kidnapping Prevention Act (PKPA)[80] were enacted. The UCCJA has attempted to limit child custody jurisdiction to one state to prevent forum shopping,[81] while the PKPA would neutralize a major motive for kidnapping by requiring states to honor sister states' custody decrees.[82]

Additionally, both acts provide for the recovery of attorney's fees and expenses in recovering a child when a parent has violated a custody decree.[83] The PKPA authorizes FBI assistance in locating an abductor who leaves the state with the child[84] and the use of the Federal Parent Locator Service (FPLS), which can provide information about a parent working under his or her own name anywhere in the United States.[85]

Unfortunately, even these acts are of limited utility.[86] Although the UCCJA and PKPA remedies provide compensation to a victimized parent, the tort remedy's damages are more inclusive and the defendant group is larger. Where other remedies may reimburse plaintiff's costs, tort cases have allowed out of pocket expenses,[87] damages for mental and emotional distress,[88] and punitive damages.[89] While other remedies may influence only remotely the return of the child, the tort remedy's defendant group is

78. *Id. See also* KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 102 (1981).

79. 9 U.L.A. 111 (1979).

80. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568-73 (codified at 18 U.S.C. § 1073 (1982), 28 U.S.C. § 1738A (1982), 42 U.S.C. §§ 654, 655, 663 (1982)).

81. Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183, 197 (1965); UCCJA § 3, 9 U.L.A. 122 (1979).

82. PKPA § 8(a), 28 U.S.C. § 1738A (1982).

83. UCCJA §§ 7(g), 8(c), 15(b), 9 U.L.A. 138-59 (1979); PKPA § 8(c), 28 U.S.C. § 1738A (1982).

84. PKPA § 10(a), 18 U.S.C. § 1073(a) (1982).

85. PKPA § 9(b), 42 U.S.C. § 663 (1982).

86. The UCCJA and PKPA are not applicable until a custody decree has been entered, and many kidnappings occur pre-decree. *See* Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 511 (1983). The UCCJA does not require states to give sister state decrees full faith and credit. Moreover, flexible standards to determine jurisdiction create the opportunity for abuse, and the UCCJA lacks sanctions to remedy violations. *See* Note, *Child Snatching: The Federal Response*, 33 SYRACUSE L. REV. 1103, 1113-14 (1982); *see generally* Hudak, *Seize, Run, and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts*, 39 MO. L. REV. 521, 547 (1974); Note, *Prevention of Child Stealing: The Need For a National Policy*, 11 LOY. L.A.L. REV. 829, 840-41, 857 (1970); Note, *The Parental Kidnapping Prevention Act: Constitutionality and Effectiveness*, 33 CASE W. RES. 89, 94 (1982).

Under the PKPA, FBI assistance is authorized only where a state felony arrest warrant has been issued, and not all states treat child snatching as a felony. HOFF, SCHULMAN, VOLENIK & O'DANIEL, *supra* note 77, at 8-19. Moreover, Department of Justice policy has limited FBI involvement to situations where the child is threatened with imminent physical injury. Such proof will be difficult for the victimized parent. *See* Note, *The Parental Kidnapping Prevention Act—Analysis and Impact on Uniform Child Custody Jurisdiction*, 27 N.Y.L. SCH. L. REV. 553, 584-86 (1981). The Federal Parent Locator Service (FPLS) is not directly available to parents and their attorneys but only to authorized officials who must be persuaded to take action. *Id.* at 588.

87. Kajtazi v. Kajtazi, 488 F. Supp. 15, 20 (E.D.N.Y. 1978) ($5,000 awarded for legal fees incurred in attempting to retrieve child).

88. Lloyd v. Loeffler, 539 F. Supp. 998, 1003 (E.D. Wis.), *aff'd*, 694 F.2d 489 (7th Cir. 1982) ($30,000 award for emotional distress).

broader and may include relatives of the snatching parent who aided in the abduction. Defendants who are still available to the court will have a strong motivation to disclose the child's location to avoid litigation or mounting damages for a continuing violation.[90] Consequently, it appears that a tort remedy may more fully compensate plaintiff for past emotional distress suffered and may prevent continuing mental harm by prompting the return of the child.

Historically, theories of tort recovery have varied in name, but overlapped significantly in substance. A number of cases have relied on the intentional infliction of emotional distress. A 1930 decision in New York, *Pickle v. Page*,[91] recognzied that in a child abduction: "The true ground of action is outrage and deprivation; the injury the father sustains in the loss of his child; the insult offered to his feelings, the heart-rending agony he must suffer in the destruction of his dearest hopes."[92]

More recently, in *Kajtazi v. Kajtazi*,[93] the mother awarded custody pending divorce sued her husband and his relatives for their role in her husband's abduction of her child to Yugoslavia. The mother, on her own behalf and as guardian ad litem for the child, alleged defendants' false imprisonment, intentional infliction of mental suffering, prima facie tort and civil conspiracy. The district court dismissed the latter two causes of action respectively, as duplicative and not recognized in New York. It awarded plaintiffs general and punitive damages of $176,430 and $5,000 legal expenses on the other counts, noting that:

> It is difficult to conceive of intentional conduct more calculated to cause severe emotional distress than the outrageous conduct of the defendant, Fabian, in surreptitiously abducting the infant from his mother, who had legal custody, and falsely imprisoning him in Yugoslavia. This outrageous conduct constitutes the distinct tort of intentional infliction of mental suffering under New York decisional law.[94]

The court in *Wasserman v. Wasserman* [95] reversed a trial court's dismissal of plaintiff's claims of child enticement, intentional infliction of emotional distress, and civil conspiracy based on the father's abduction of his three children. Although the court concluded the allegations were not within the domestic relations exception to federal diversity jurisdiction,[96] it found that

89. Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980) (various defendants assessed $65,000 in punitive damages).

90. *See* HOFF, SCHULMAN, VOLENIK & O'DANIEL, *supra* note 77, at 14-2. For example, in Lloyd v. Loeffler, 539 F. Supp. 998, 1005 (E.D. Wis), *aff'd*, 694 F.2d 489 (7th Cir. 1982), $2000 per month was assessed against the kidnapping mother and her husband for every month the child was not returned. This kind of award could be made against remaining relatives who aided in the abduction and who know the child's whereabouts. The appellate court, in dicta, however, suggested this type of award might be within the domestic relations exception. 694 F.2d at 493-94. *See infra* note 96 and accompanying text.

91. 252 N.Y. 474, 169 N.E. 650 (1930).

92. *Id.* at 480, 169 N.E. at 652.

93. 488 F. Supp. 15 (E.D.N.Y. 1978).

94. *Id.* at 20.

95. 671 F.2d 832 (4th Cir. 1982).

96. *Id.* at 834-35. The federal courts have long considered the granting of divorces and the determination of custody to be outside diversity jurisdiction. This doctrine, the domestic rela-

the complaint stated generally cognizable common law torts. Similarly, the Vermont Supreme Court found[97] a cause of action for intentional infliction of emotional distress where a mother alleged she had been denied communication with her daughter for three weeks.[98]

Most recently, a jury in *Cramlet v. Donahue* [99] returned a verdict against defendants[100] for $5,900,000 based on claims of tortious interference with custody, civil conspiracy and outrageous conduct. A number of other cases have relied on the tort of custodial interference, citing Restatement (Second) of Torts Section 700,[101] instead of the infliction of mental distress tort. While the tort of custodial interference had its origins in the loss of service suffered by the deprived parent,[102] such loss of service is no longer a necessary element of the cause of action: "The deprivation to the parent of the society of the child is itself an injury that the law redresses."[103] Although the custodial interference cause of action provides damages for loss of service if such has occurred, the more significant damages aspect appears to be for emotional distress and expenses incurred in regaining custody.[104] Thus, the overlap with the emotional distress cause of action is obvious.[105]

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tions exception, arose from interpretations of dicta in Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858) and *Ex Parte* Burrus, 136 U.S. 586 (1890). While many family questions are thus excluded from the federal courts, some issues are considered sufficiently removed from the marital relationship so as to fall outside the exception. Cole v. Cole, 633 F.2d 1083, 1087-89 (4th Cir. 1980) (claims of malicious prosecution, arson, conspiracy and conversion).

97. Sheltra v. Smith, 392 A.2d 431 (Vt. 1978).

98. *Id.* at 432.

99. 9 FAM. L. REP. (BNA) 2452 (D. Colo. May 13, 1983).

100. The defendants originally were Phil Donahue, other members of the show's staff, and the broadcast corporation involved with the Donahue Show. Donahue and the employees were dropped from the suit. Plaintiff alleged the television defendants withheld information from her regarding her son's whereabouts.

101. RESTATEMENT (SECOND) OF TORTS § 700 (1977).

> Causing Minor Child to Leave or not to Return Home. One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.

*Id.*

102. Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 508 (1983); Rice v. Nickerson, 91 Mass. 478, 481 (1864) (damages for expenses).

103. RESTATEMENT (SECOND) OF TORTS § 700, comment d (1977). As early as 1877, the Ohio Supreme Court commented, "Actual loss of services is not an essential allegation to enable plaintiff to maintain his (custodial interference) action. Clark v. Bayer, 32 Ohio St. 299, 313 (1877).

104. RESTATEMENT (SECOND) OF TORTS § 700, comment g (1977).

> The parent can recover for the loss of society of his child and for his emotional distress resulting from its abduction or enticement. If there has been a loss of service or if the child, though actually not performing service, was old enough to do so, the parent can recover for the loss of the service that he could have required of the child during the period of its absence.

*Id.*

105. While section 46, outlining the emotional distress tort, *supra* note 12, is broader in the conduct it condemns, section 700 theoretically would allow recovery for an interference of short duration where section 46 may not. *See* Note, *Abduction of Child by Noncustodial Parent: Damages for Custodial Parent's Mental Distress*, 46 MO. L. REV. 829, 834 (1981). On the other hand, the tort of custodial interference may not be applicable until a custody decree has been entered, but the emotional distress tort would cover pre-decree situations.

In *Lloyd v. Loeffler*,[106] a Wisconsin district court concluded plaintiff had stated a cause of action for civil conspiracy under Wisconsin law against his ex-wife and certain of her family members for abduction and concealment of his child. The court decided defendants owed a duty to plaintiff, citing Section 700 and state criminal statutes against custodial interference. The compensatory damages of $95,000 later awarded by the court to plaintiff included $30,000 for emotional distress, and plaintiff also was to receive $2000 per month until his child was returned.

In *Fenslage v. Dawkins*,[107] a father refused to return his children to the custodial mother after summer visitation and fled to Canada. The mother alleged civil conspiracy and the intentional infliction of mental anguish through custodial interference. The jury, awarding her $65,000 in compensatory damages, concluded the defendant father and his relatives had conspired to remove the children from the state in violation of a custody decree, had actively concealed their whereabouts, and intentionally caused the mother to suffer mental distress. The District of Columbia also has recognized the cause of action for custodial interference.[108] Moreover, a Louisiana Court[109] not only affirmed a judgment for plaintiff, reasoning that the abducting wife had violated the state's kidnapping statute and breached a duty owed to the father, but also increased the damages.

### B. Other Causes of Action for the Intentional Infliction of Emotional Distress Within the Family

Although these cases above dealt with the tort elements in a conclusory manner, at least they exhibited a rational structure for analysis. A number of other cases dealing with additional aspects of family life have affirmed causes of action for the intentional infliction of emotional distress.

The North Carolina Supreme Court in *Stanback v. Stanback*[110] held that plaintiff's allegations of outrageous conduct in breach of their separation agreement stated a claim for the intentional infliction of emotional distress against her husband.[111] Similarly, defendant's intentional infliction of emotional distress was clearly involved in *Mahnke v. Moore*,[112] although the court chose to analyze the facts in terms of the negligent infliction of emotional distress. In *Mahnke*, a child was found to have a cause of action against her father's estate when he murdered her mother in front of her, left her with the body for a week, and then committed suicide in her presence. Similarly, the court's analysis is clouded in the 1914 case of *Mashunkashey v. Mashunkashey*,[113] since the tort of outrage was just developing at the time.

106. 539 F. Supp. 998 (E.D. Wis.), *aff'd*, 694 F.2d 489 (7th Cir. 1982).
107. 629 F.2d 1107 (5th Cir. 1980).
108. Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982).
109. Spencer v. Terebelo, 373 So. 2d 200 (La. Ct. App. 1979).
110. 297 N.C. 181, 254 S.E.2d 611 (1979).
111. *Id.* at 205-06, 254 S.E.2d at 621. The issue of emotional distress arose unusually in this case. The precise issue was whether the breach of contract, in this case a separation agreement, was accompanied by an independent tort so as to support a punitive damage award.
112. 197 Md. 61, 77 A.2d 923 (1951).
113. 189 Okla. 60, 113 P.2d 190 (1914).

The court did seem, however, to recognize an independent cause of action for emotional distress when defendant husband tricked plaintiff into a bigamous marriage.[114]

In *Johannes v. Sloan*,[115] plaintiff father, the non-custodial spouse, was awarded $150,000 for the severe emotional distress he suffered after being deprived of his visitation rights. The Family Law Reporter also cites a jury verdict for a father based on his wife's interference with his visitation rights and her malicious alienation of his children.[116] Similarly, in *Rodgers v. Rodgers*,[117] plaintiff's allegations of emotional distress suffered because of his wife's interference with visitation survived a motion to dismiss.

Some courts, after analyzing the acts of a suit alleging the intentional infliction of emotional distress, concluded certain necessary elements were missing, and dismissed the claims. Such was the case in *Hansen v. Hansen*,[118] where a child sued his mother for intentional infliction of emotional distress because they had a fight over his drug usage, and thereafter she sent him away to school. The mother's summary judgment motion was granted since the court found no issue of fact as to whether the mother's conduct was outrageous, one of the tort's essential elements. In *Deibel v. Deibel*,[119] where the plaintiff wife alleged intentional infliction of emotional distress by the defendant due to his failure to pay alimony, the court dismissed because defendant's failure to pay was not outrageous behavior as a matter of law. Lifewise, the court in *Przybla v. Przybla*,[120] dismissed plaintiff's complaint where he alleged the intentional infliction of emotional distress after his wife had an abortion against his wishes. Because defendant was exercising her constitutional right to abort,[121] the court reasoned her behavior could not be termed extreme or outrageous.

The court in *Vance v. Vance*,[122] on unusual facts, concentrated on another element of the emotional distress tort. Defendant husband told his wife their twenty-year marriage was invalid and that he was marrying another woman. The court concluded that the husband's concealment of the truth twenty years earlier, the behavior plaintiff complained of, could not have intended plaintiff emotional distress since the husband could not have foreseen the circumstances (that he wanted to marry another) in which the truth would be revealed.

## IV. A PERSPECTIVE ON THE EMOTIONAL DISTRESS TORT IN THE FAMILY SETTING

Although these decisions at least look to the substance of the emotional

114. *Id.* at 61, 113 P.2d at 191.
115. No. 79-L-169 (Kankakee County Cir. Ct., Mar 25, 1981).
116. 6 FAM. L. REP. (BNA) 2764 (1980).
117. No. 82-L-10593 (Cook County Cir. Ct., July 18, 1983).
118. 608 P.2d 364 (Colo. App. 1979).
119. 512 F. Supp. 135 (E.D. Mo. 1981).
120. 87 Wis. 2d 441, 275 N.W.2d 112 (1978).
121. Roe v. Wade, 410 U.S. 116, 154 (1973). The Court concluded that the right of personal privacy includes the decision to abort.
122. 286 Md. 490, 408 A.2d 728 (1979).

distress tort, their attention can best be described as fleeting. Such conclusory analysis, while preferable to cases finding the tort of emotional distress inapplicable, is of little help in understanding the tort's role in the family setting.

Decisions in this area suffer from one of two problems—either they refuse to recognize the propriety of an intentional infliction of emotional distress action in the family arena,[123] or recognizing the cause of action, they fail to specify clearly the standards of liability.[124] Those courts which conclude the emotional distress tort is unavailable to family members[125] can cite some support for their position.[126]

Why should injuries which are recognized between strangers or when inflicted on a family member by a stranger[127] not be recognized between family members? As submitted earlier, few logical reasons have been or can be advanced.

In *Burnette v. Wahl*,[128] Linde, dissenting from the action's dismissal, found certain of the majority's premises unsupportable. For example, he argued that the abandoned child, who has no cause of action against the deserting parent for emotional injury since such action could disrupt the family, also should be barred from bringing physical injury suits, and is not.[129] Moreover, he argued that the statutory breach of duty at the foun-

123. *See supra* text accompanying notes 63-75.

124. *See supra* text accompanying notes 76-122.

125. *See* 584 S.W.2d 406 (Ky. Ct. App. 1979); 22 N.Y.2d 28, 2, 237 N.E.2d 876, 290 N.Y.S.2d 732 (1968).

126. GREEN, PEDRICK, RAHL, THODE, HAWKINS AND SMITH, INJURIES TO RELATIONS 175 (1968). *See also* Foster, *Relational Interests of the Family*, 1962 U. ILL. L.F. 493, 522: "Theoretically, a husband, as against a wife, has a legally recognized relational interest in her society and services, and also in her support if he is indigent or infirm. Only her limited duty of support lends itself to reasonably effective law enforcement. The husband's rights are operative only on a moment to moment basis and the woman may withdraw her society, affections or services at any time she pleases and the most the husband can do is to seek reinstatement in her favor, retaliate in kind or get a divorce. The wife's rights are similar."

Relational interests are "the interests a person may have in his relations with other persons . . . ." L. GREEN, THE LITIGATION PROCESS IN TORT LAW 413 (2d ed. 1977). From a broad perspective (and apparently in the thoughts of the above-quoted authors) relational interests may arise between the two parties to the relationship but they fall outside the law's protections except as against interference by third persons. Green, however, states: "These inquiries do not involve the simple two-party situations found in the protection of person and property. They are always three-party situations; a relation which necessarily implies two persons, and a third party who interferes with that relation." *Id.* at 417-18. He implies that the interests between the two parties are of personality not of relation. Emotional distress is usually considered injury to personality, though such injury can also be viewed as parasitic damage when there has been an injury to a relational interest, and is often the major element of such damage. *See, e.g.*, RESTATEMENT (SECOND) TORTS § 700, comment g (1977). Whether we look at these family situations in terms of injury to relations or personality, the limits on the action noted by Green and Foster, *supra*, would be applicable.

127. For example, the abduction and enticement cases recognize the child's right to enjoy the intangible benefits of family life. *See, e.g.*, Rosefield v. Rosefield, 221 Cal. App. 2d 431, 34 Cal. Rptr. 479 (1963). *See also* Comment, *Negligent Injury to Family Relations: A Reevaluation of the Logic of Liability*, 77 NW. L. REV. 794 (1983). Damages for loss of consortium also protect these interests from negligent injury. Yet, the court in Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105 (1978), dismissed plaintiff's claims regarding the loss of such benefits.

128. 284 Or. 705, 588 P.2d 1105 (1978).

129. *Id.* at 723-31, 588 P.2d at 1115-19 (Linde, J., dissenting). Although Justice Linde felt that a civil action could be implied from violation of a criminal statute, his analysis of the cited

dation of the case "would not give rise to an expandable common law precedent,"[130] thereby negating the court's concern with suits arising from trivial incidents.

Nor are any of the traditional objections to the emotional distress tort any more applicable in the family situation than among strangers.[131] The argument that proof is too difficult[132] is still subject to the defense that similar damage determinations are made successfully in wrongful death actions. Mental consequences from intrafamily torts are certainly no less foreseeable[133] than those arising from torts among strangers. In fact, such consequences probably are more foreseeable. Perhaps the most valid criticism "lies in the 'wide door' which might be opened not only to fictitious claims, but to litigation in the field of trivialities . . . ."[134] The family setting may provide more opportunity for trivial claims to arise, but that possibility "is a poor reason for denying recovery for any genuine, serious mental injury."[135] Although clearer guidelines for the imposition of liability may indeed be necessary,[136] this is far less drastic than denying the entire cause of action.

Closely related to the fear of a flood of trivial litigation is the theory that family members have assumed the risk of or have impliedly consented to most emotional injury by another family member.[137] While "consent may be assumed to the ordinary contacts of daily life,"[138] it is difficult to infer consent to abandonment or to failure to pay alimony. Moreover, even if consent were to be implied to certain emotional "rough-housing," if defendant exceeds that consent and does a substantially different act, such as commit adultery, the consent is void.[139] Since no rationale justifies the outright denial of a cause of action for the intentional infliction of emotional distress, the approach followed by the court in *Treschman v. Treschman*,[140] is more appropriate:

> We quite agree with appellant's counsel that courts should hesitate to invade the privacy of the home, or to question that mutual confidence which should obtain in the household. But this privacy and mutual confidence should not be permitted to shield an evil

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points would have been relevant in establishing the outrageousness of defendant's behavior for the intentional infliction of emotional distress cause of action as well.

130. 284 Or. at 730-31 n.5, 588 P.2d at 1119 n.5.

131. *See* Guynn, *Compensation for "Orphans of the Living": An Evaluation of the Proposed Tort of Abandonment*, 18 J. FAM. L. 501, 519-21, (1979).

132. *See supra* text accompanying note 7.

133. *See supra* text accompanying note 10.

134. W. PROSSER, *supra* note 5, at 51.

135. *Id.*

136. *See infra* text acompanying notes 152-97.

137. McCurdy, *Torts Between Persons In Domestic Relations, supra* note 32, at 1078. If the injury does not extend in its pecuniary effects beyond minority, there is perhaps no good purpose to be served in permitting an action against the parent for pain, suffering, and injury to feelings, unsupported by pecuniary damage, since these matters may well be considered as risks of the relation, although such action may be maintained against third persons, at least for intentional aggressions.

138. W. PROSSER, *supra* note 5, § 18, at 102. *See also* RESTATEMENT (SECOND) OF TORTS, § 895F, comment h and § 895G, comment k (1977).

139. W. PROSSER, *supra* note 5, at 104.

140. 28 Ind. App. 206, 61 N.E.961 (1901) (intentional physical injury).

doer from the consequences flowing from a palpable wrong.[141]

### A. "Real" Versus "Tangential" Family Cases

Admittedly, the cases discussed above are of little assistance in determining what are palpable wrongs justifying recovery. One preliminary problem is the failure to distinguish those cases inherently dependent on their family settings from those which only tangentially involve a family. Where litigation only happens coincidentally to involve a family, the case should be dealt with as any other emotional distress action. Yet, some of these cases have been dismissed on vague family policy grounds.

In child-snatching cases,[142] for example, plaintiff is alleging defendant's interference with his or her relationship with a child and the resulting emotional distress, not a disruption of plaintiff's relationship with defendant. Since defendant's position as plaintiff's spouse has no impact on plaintiff's distress, and the child snatching and resultant distress could have been caused by a stranger to the family setting,[143] no different analysis of defendant's conduct is required because of the parties' relationship.

Analyzed from this perspective, cases alleging interference with visitation rights of the non-custodial spouse[144] do state a valid claim. As in the child-snatching cases, defendant is causing plaintiff's mental distress by interference with plaintiff's relationship with a third party. There is a distinction between these types of cases, however, because it is hard to visualize how a stranger to the relationship could interfere with visitation. Typically the custodial ex-spouse causes the non-custodian distress. Even so, as in the child-snatching cases, the distress suffered is not related to the plaintiff and defendant's relationship, but to plaintiff's relationship with the child. Accordingly, it should be judged separately from the parties' family ties. Even if the court disregards the parties' relationship, additional safeguards still exist since the elements of an emotional distress action remain for analysis and the plaintiff must meet the necessary burden of proof.[145]

Frequently, defendant interferes not with a relationship, but with some financial expectancy[146] of plaintiff. Although that expectancy arises from a prior relationship between the parties, the obligation is independent of that relationship and a similar kind of obligation could arise among strangers. The distress arises not because the parties are or were spouses, but because defendant failed to pay plaintiff some money. The action ought not to be barred because it is between ex-spouses, but ought to be compared with analogous cases such as those alleging insurance companies' intentional infliction of emotional distress by failure to pay claims.[147] On the basis of

141. *Id.* at 210-11, 61 N.E. at 963.

142. *See supra* text accompanying notes 91-109.

143. Wasserman v. Wasserman, 671 F.2d 832, 834-35, (4th Cir. 1982).

144. *See supra* text accompanying notes 70-71, 115-17.

145. Plaintiff will have to show defendant intended to cause plaintiff's severe emotional distress by his or her outrageous conduct. *See supra* note 12.

146. *See supra* text accompanying notes 110 and 119.

147. *See* Whitten v. American Mutual Liability Ins. Co., 468 F. Supp. 470, 479 (D.S.C. 1977), *aff'd*, 594 F.2d 860 (4th Cir. 1979) (allegations failed to show outrageous conduct);

particular facts, a jury may conclude the conduct has not been outrageous and dismiss the cause of action, but the family tie is irrelevant in that determination.

### B. EMOTIONAL HARM ARISING FROM THE RELATIONSHIP BETWEEN THE LITIGANTS: "REAL" FAMILY CASES

Having eliminated one source of confusion by drawing the distinction between "real" and "tangential" family cases, we are left with the "real" family cases, those alleging emotional harm arising out of the relationship between the litigants.[148]

Because these parties are complaining about interaction that occurs on an intense day to day basis, courts have hesitated to become involved. Although the concern that courts could be flooded with trivialities is legitimate, more careful analysis of the specific elements of the emotional distress tort would eliminate much of this judicial hesitation.

Most courts have focused their attention on the element requiring that the defendant's conduct be outrageous.[149] As a practical matter, severe emotional distress, another element of the tort, may be inferred from outrageous conduct, according to the Restatement.[150] Unfortunately, the Restatement's explanation of just what constitutes outrageous conduct is not very helpful, speaking in terms of "atrocious, . . . utterly intolerable."[151] In fact, the Restatement's treatment indicates that the requirement of outrageous behavior by the defendant may be the most ill-defined and amorphous of the tort's elements.

Perhaps the more reaonable way for a court to proceed would be to first determine whether or not defendant intended to and has, in fact, caused plaintiff serious mental distress. In many instances of emotional family interaction, plaintiff will have difficulty proving that defendant intended to injure plaintiff or knew to a substantial certainty[152] that emotional distress would result. In even more instances, plaintiff will be unable to show *severe* mental anguish.[153] By analyzing these factors, many of the petty complaints that could arise would be eliminated without a trial.[154]

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Fletcher v. Western National Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970) (jury verdict for plaintiff upheld).

148. *See supra* text accompanying notes 63-69, 72-73, 112-113, 118, 120, 122.

149. *See supra* text accompanying notes 118-20.

150. "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." RESTATEMENT (SECOND) TORTS § 46, comment j (1965). *See also* Note, *Abduction of Child By Noncustodial Parent: Damages For Custodial Parent's Mental Distress*, 46 MO. L. REV. 829, 835-36 (1981) (abduction of child is significant evidence that distress was suffered).

151. RESTATEMENT (SECOND) TORTS § 46, comment d (1965). This definition has been criticized as being circular. Theis, *The Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 DE PAUL L. REV. 275, 290 (1978).

152. *See supra* note 14.

153. *See supra* note 16. For example, if a husband and wife have a fight, it will be difficult to show more than a temporary anguish. Moreover, the intent element and the distress suffered elements are more definite than the outrageous conduct requirement, and may serve to defeat the cause of action.

154. To survive a motion to dismiss or for summary judgment, plaintiff's allegations would

If, however, defendant intended to harm plaintiff in a serious way and succeeded, the next question to be addressed is whether or not the conduct was outrageous. What is or is not outrageous may be more precisely determined by balancing the parties' interests.[155] Such a balancing approach is certainly not new to the law. It is basic to the defense of privilege,[156] and is the core of the reasonableness determination in negligence.[157] In fact, this accommodation of competing interests underlies much of tort law.[158]

Approaching the issue of outrageousness from the perspective of competing interests has the additional advantage of lending more certainty to determinations made in situations difficult to evaluate because of the relationship of the parties.[159] Traditionally, the intimate nature of familial interaction and the attendant notions of one's implied consent to such relationships prompted judicial reluctance. But, this new approach may stimulate more judicial confidence since the answer is derived by comparing the interests defendant is promoting with the interests being harmed, instead of by deciding whether something "looks" outrageous.[160]

In some cases it appears that defendant, by the conduct complained of, is merely exercising a right established by the courts or the legislature. For example, in *Przybyla v. Przybyla*,[161] plaintiff's complaint alleged that defendant sought an abortion, which is her constitutionally protected right. In such a situation, defendant's interest is paramount over plaintiff's more generalized interest in being free from emotional disturbance. Of course, if defendant takes action not intended to further his or her own interest but to harm plaintiff's, the balance could tip against defendant.[162] Similarly, if the only allegations are that a party is seeking a divorce, as one is entitled to do

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have to indicate a mental reaction more serious than a headache or a few sleepless nights. Swanson v. Swanson, 121 Ill. App. 2d. 182, 257 N.E.2d 194 (1970).

155. *See generally* Hochman, *Outrageousness and Privilege in the Law of Emotional Distress—a Suggestion*, 47 CORNELL L.Q. 61 (1961) (suggesting a qualified-privilege approach to emotional distress claims).

156. W. PROSSER, *supra* note 5, § 16, at 98-99.

157. *Id.*

158. *See generally* Green, *The Study & Teaching of Tort Law*, 34 TEX. L. REV. 1, 15-17 (1955) (describing the public policy considerations underlying the judiciary's balancing role); W. PROSSER, *supra* note 5, § 3, at 14-16.

159. It may seem easier to establish defendant's lack of justification under this new approach than his or her outrageous conduct under the old. Nonetheless, many cases will be eliminated by a consideration of the intent and distress suffered elements. If having established those elements, plaintiff shows defendant's lack of justification, plaintiff may be entitled to recovery. *See* Hochman, *supra* note 155, at 67-68. Liability would probably not be expanded since a careful consideration of *all* the elements would eliminate most complaints, but in a more analytically satisfying way.

160. RESTATEMENT (SECOND) OF TORTS § 46, comment d (1965). Since this is a new approach, this article suggests its use in the "real" as opposed to the "tangential" family cases. Once a court realizes that the family relationship is irrelevant in the "tangential" cases, it ought to be able to proceed with the traditional analysis. But where the family relationship is relevant, and courts tend to dismiss without sufficient analysis, a more structured approach may be helpful.

161. 87 Wis. 2d 441, 275 N.W.2d 112 (1978).

162. RESTATEMENT (SECOND) OF TORTS § 46, comment g (1965) states: "The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." If defendant acts in an impermissible way, the case would be analogous to the loss of a qualified privilege to defame. RESTATMENT (SECOND) OF TORTS § 603 (1977).

under state law,[163] the conduct cannot be outrageous. Such an approach would eliminate the fear voiced by the *Burnette v. Wahl* [164] majority that any divorcing parent would be liable for the distress inflicted on his or her child because of the dissolution.

Directly contrary are cases where defendant violates an established right of plaintiff or abrogates an established duty owed to plaintiff. Again, the balance of interests already has been established by the courts or the legislature, and if the plaintiff has suffered severe emotional distress by defendant's intentional act, defendant will be hard pressed to argue the action is not outrageous. Although a specific duty regarding their relationship may be embodied in a criminal statute,[165] duties also may be implied from civil statutes.[166]

The approach suggested in this article would lead to a result contrary to that reached in *Burnette*,[167] where the court found the emotional distress tort inapplicable to the parent-child relationship. Thus, where plaintiff child complains of maternal abandonment, plaintiff's right to be cared for is protected by statute in every jurisdiction.[168] Since the legislatures have spoken at length regarding the rights of children and their concerns with their welfare,[169] the balance between the parents' freedom of action and the child's right to care already has been fixed. Where the child suffers severe distress, and abandonment obviously affects mental as well as physical well-being,[170] the complaint should be actionable.

Similarly, defendant's bigamy, which was the basis for plaintiff's com-

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163. H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 788 (3d ed. 1980).

164. 284 Or. 705, 716, 588 P.2d 1105, 1111-12 (1978).

165. *See, e.g., infra*, text accompanying notes 169-70. The analysis would then be very similar to that of using a violation of statute to establish negligence. W. PROSSER, *supra* note 5, § 36, at 190. Note, however, that this is not a suggestion that a private right of action arises from the statute. Rather, plaintiff will have to prove the elements of the tort. The violation of duty helps establish the outrageousness of the behavior.

166. *See infra* text accompanying notes 173-77.

167. 284 Or. 705, 588 P.2d 1105 (1978).

168. *See* Katz. Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1 (1975) for a compilation of statutes applicable in all jurisdictions.

169. *See, e.g.*, N.Y. FAM. CT. ACT § 1011 (McKinney 1983). § 1011 states as the purpose of the act:

> to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state . . . may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.

*Id.*

The purpose clause of the Oregon statute, OR. REV. STAT. § 419.474 (1981 Repl. Part) states:

> The provisions . . . shall be liberally construed to the end that a child coming within the jurisdiction of the court may receive such care, guidance and control, preferably in his own home, as will lead to the child's welfare and the best interest of the public, and that when a child is removed from the control of his parents the court may secure for him care that best meets the needs of the child.

*Id.*

170. Studies of foster children's adjustment have noted their trauma on separation from the parents and difficulties in establishing new, sound relationships. *See* H. MAAS & R. ENGLER, CHILDREN IN NEED OF PARENTS 356 (1959); Maas, *Highlights of the Foster Care Project: Introduction*, CHILD WELFARE, July 1959, at 5; Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 623-25 (1973).

plaint in *Mashunkashey v. Mashunkashey*,[171] is universally condemned,[172] and would not be accorded much weight in a balancing test. Accordingly, defendant's interest in committing a criminal act will not compare favorably to plaintiff's interest in not being subjected to the humiliation and anguish of learning that her marriage is void. In fact, defendant's behavior appears actionable as outrageous.

Lastly, the New York Court of Appeals decision in *Weicker v. Weicker*,[173] may be questioned. Defendant's first wife alleged emotional distress because of the defendant's procurement of an illegal Mexican divorce and his remarriage.[174] Although defendant had the right to divorce plaintiff under state law, he only had the right to divorce legally, and had a duty not to divorce illegally. Assuming an illegal divorce, it follows that defendant owed plaintiff duty not to remarry.[175] Again, it would seem defendant's failure to act within the laws, and plaintiff's resulting emotional distress, would tip the balance away from defendant.[176] Under this reasoning, the *Weicker* [177] trial court's decision is more convincing.

Where defendant is neither protecting nor violating a clearly established right, a more detailed investigation of each of the parties' interests is necessary. In *Wiener v. Wiener*,[178] for example, defendant alleged in her counterclaim that plaintiff was abusive and told her he did not love her. Obviously, plaintiff was exercising his right of free speech. Although that right has never been an absolute,[179] the ability to speak one's mind in the family context has greater value than the peace of mind of the person listening. Because the family's functioning depends on open and free communication, even negative give and take is necessary. Accordingly, this communication does fall within the "assumed risks" of the relationship.

A similar situation occurred in *Hansen v. Hansen* [180] where a child alleged that his mother fought with him over his drug usage and sent him away to school.[181] Defendant's interest in disciplining her child is quite strong[182] compared to the child's interest in freedom of action and tranquility.[183] Be-

171. 189 Okla. 60, 113 P.2d 190 (1941).

172. There are both civil and criminal sanctions for bigamy. H. CLARK, *supra* note 163, at 120. There is, however, a strong presumption of the validity of the most recent marriage. *See, e.g.*, Patillo v. Norris, 65 Cal App. 3d 209, 215, 135 Cal. Rptr. 210, 214 (1976); Johnson v. Young, 372 A.2d 992, 994 (D.C. 1977).

173. 22 N.Y.2d 8, 237 N.E.2d 876, 290 N.Y.S.2d 732 (1968) (per curiam).

174. *See* Weicker v. Weicker, 53 Misc. 2d 570, 279 N.Y.S.2d 852 (1967), *rev'd*, 28 A.D.2d 138, 283 N.Y.S.2d 385, *aff'd*, 22 N.Y.2d 8, 237 N.E.2d 876, 290 N.Y.S.2d 732 (1968).

175. This duty is similar to that in *Mashunkashey*, 189 Okla. 60, 113 P.2d 190, but runs to the first wife instead of the second.

176. An interesting issue at trial would have been the cause in fact issue. Plaintiff would have had to prove that it was the *illegal* divorce and remarriage which caused her distress, *not* that defendant wanted to get a divorce, to which he was entitled.

177. 53 Misc. 2d 570, 279 N.Y.S.2d 852.

178. 84 A.D.2d 814, 444 N.Y.S.2d 130 (1981).

179. Liability for defamation restricts one's freedom of speech. Liability for the intentional infliction of emotional distress can flow from spoken words. W. PROSSER, *supra* note 5, § 12.

180. 43 Colo. App. 525, 608 P.2d 364 (1979).

181. *Id.* at 526, 608 P.2d at 365.

182. There is a well-recognized privilege to discipline children. *See* RESTATEMENT (SECOND) OF TORTS §§ 147-155 (1965).

183. Although there has been an upsurge of interest in the field of children's rights, legally

cause it appears here that defendant was exercising her responsibility to her child, not abrogating it as in *Burnette*,[184] the allegations should not be actionable.

In the *Vance* [185] case, referred to above, defendant married plaintiff not knowing his prior divorce was still pending.[186] Although he discovered it shortly thereafter, he did not inform plaintiff until twenty years later when he wanted to divorce her.[187] Conceding that defendant was unaware of the problem at the time of the marriage, plaintiff complained of his failure to alert her when he did find out.[188] Unfortunately, the court's conclusion that defendant could not have intended plaintiff distress, since he could not have foreseen the unhappy circumstances when he did tell her, is flawed.[189]

Again, a balancing test answering the following questions would be enlightening. Why did he keep the void marriage a secret? What interest did defendant have in not disclosing the truth compared to plaintiff's distress when she did learn the true status of their marriage? Clearly, her distress could have been obviated by defendant's early disclosure. Therefore, defendant's conduct is unjustified.

Somewhat more difficult is the *Browning v. Browning* [190] decision. In that case, plaintiff complained of his wife's consorting with a third party, bestowing her companionship, affections and society upon him, and secluding herself with him.[191] Assuming that plaintiff is alleging defendant's adultery, the interests asserted are much more closely balanced. Plaintiff claimed an interest in a faithful spouse,[192] while defendant countered that she should have great sexual freedom. At least one author has suggested that changing mores indicate: "the rights of the spouse flowing from the marital relationship should no longer be conclusively presumed to include a monopoly interest in his or her partner's sexual intercourse."[193] In fact, there is even some support for her argument that a damages award for adultery would violate her constitutional right to privacy.[194]

In jurisdictions where the criminal conversation action against third parties still exists, some judicial balancing of these types of interests has already been done, and plaintiff's right to damages for loss of an exclusive spousal sexual relationship has been sanctioned. Even where the action has

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enforceable rights are limited. *See generally* Rodham, *Children's Rights: A Legal Perspective*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21 (P. Vardin & I. Brody eds. 1979).

184. 284 Or. 705, 588 P.2d 1105 (1978).

185. 286 Md. 490, 408 A.2d 728 (1979).

186. *Id.* at 493, 408 A.2d at 729.

187. *Id.* at 493, 408 A.2d at 729-30.

188. *Id.* at 492-93, 408 A.2d at 729.

189. *See id.* at 506, 408 A.2d at 736-37

190. 584 S.W.2d 406 (Ky. Ct. App. 1979).

191. *Id.* at 407.

192. Most couples, unless they have mutually agreed otherwise, expect to have an exclusive sexual relationship with their spouse. Adultery is a ground for divorce in most states. H. CLARK, *supra* note 163, at 815.

193. Note, *The Case for Retention of Causes of Action for Intentional Interference With the Marital Relationship*, 48 NOTRE DAME LAW. 426, 433 (1972).

194. Fadgen v. Lenkner, 469 Pa. 272, 283-84, 365 A.2d 147, 153 (1976) (Manderino, J., concurring); Kyle v. Albert, 2 Fam. L. Rep. 2361 (1976).

been abrogated,[195] that right has not necessarily been eliminated.[196] But the trend toward abolishing such causes of action shows a lessened concern with protection of this type of interest, and indicates that the balance may swing toward defendant's interest in sexual freedom.[197]

In summary, where defendant's interference with plaintiff's equanimity could be accomplished as well by an outsider, cases should be treated like any other emotional distress case. Where, however, the allegations involve complaints about the parties' relationship, a clearer analytical structure may alleviate judicial hesitation over involvement in family matters and concerns over a flow of petty complaints which could arise because of the nature of that family relationship.

## CONCLUSION

The intentional infliction of emotional distress tort has developed from a "new tort" to a well-accepted cause of action in a relatively short time span. Its elements are fairly well articulated, but suffer from a lack of precision in application.

As the mental distress tort developed, intrafamily immunities were abolished. Such developments naturally raise questions concerning the application of the emotional distress tort in the newly available field of family liability.

Some courts have responded to the challenge by refusing to recognize the claims. This article suggests that such an approach ignores the raison d'etre of tort law, compensation, and leaves plaintiff without a remedy. There is no inherent reason why emotional distress among family members should not be compensable. What is needed, however, is a clearer analysis of the facts of the case and in those situations truly involving the family relationship, a more specific inquiry into what constitutes outrageous behavior.

Some decisions categorically deny the availability of the cause of action for the intentional infliction of emotional distress when it is not even relevant that a family is involved. Cases denying a cause of action when plaintiff complains of defendant's interference with visitation or failure to make alimony or support payments could be better analogized to cases involving similar interferences among strangers. The child-snatching cases, by recognizing a cause of action, implement this approach.

Where the facts do involve a disruption of the relationship between the two parties to the suit, other problems are presented. There is a legitimate concern that the close nature of the relationship may lead to an unwieldy number of trivial complaints. Some courts may have been unwilling to determine whether the conduct was outrageous on the *Restatement's* amorphous standards. A balancing of the parties' interests would, it is suggested, lend more certainty to that determination and present a more acceptable stan-

195. *See supra* text accompanying note 55.

196. *See supra* text accompanying note 56.

197. Note, however, if one's concern is with vague allegations of mistreatment there are attendant difficulties of proof, while allegations regarding socializing with a third person would be fairly definite and susceptible of proof.

dard for liabilty. Family members do inflict emotional distress on one another, and where that distress is intended and results, the defendant who has acted without justification should be liable.